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Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 3

FRED L. FOX, INDIVIDUALLY AND AS STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

vs.

THE DRAVO CONTRACTING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF OF APPELLANT

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OCTOBER TERM, 1936

No. 625

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vs.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF OF APPELLANT

OPINION BELOW

The findings of fact, conclusions of law and opinion of the court below are contained in the record (R. 405-414) and reported in 16 Fed. Supp. 527.

JURISDICTION

A statement as to jurisdiction (and an amended statement as to jurisdiction) has been filed and separately printed, pursuant to Rule 12, Paragraph 1 of this court. It is not controverted that Section 238 of the Judicial Code, as amended, confers jurisdiction upon this court. Probable jurisdiction was noted on February 1, 1937.

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia, rendered by a three-judge court convened under the provisions of Section 266, amended, of the Judicial Code (28 USCA 380) (R. 313). The case involves the constitutionality and applicability of what is commonly referred to as the West Virginia Gross Sales and Gross Income Tax, as amended by Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933 (R. 26), as applied to The Dravo Contracting Company, a Pennsylvania corporation, which contracted with the United States to erect certain locks and dams on and along the Kanawha river, and certain locks on and along the Ohio river, all within the territorial limits of the State of West Virginia.

The act imposes taxes at varying rates upon varying businesses conducted within the State of West Virginia, the part here involved being clause (e) of Section 2 (R. 30), imposing a tax of two per cent of the gross income of the business of every person engaged in the business of contracting within this state.

By stipulation of counsel (R. 426) there has been printed, as typical of the four contracts involved, the contract between appellee and the Federal Government, known as "London Lock and Dam Contract," which contract provides for the construction of twin locks and a roller gate dam on the Kanawha river at London, West Virginia (R. 61-387).

The invitation to bid calls for sealed bids for the furnishing of labor and materials and for performing and constructing "the second (Lock B) of the twin locks, a roller gate dam, alterations to the upper miter-gate of the existing lock A, a power house on the river

wall of lock A, and furnishing and installing the power house machinery and lock illumination system at the London lock and dam, Kanawha river, West Virginia * * * *" (R. 61). It is provided in the invitation to bid, "All bids must be for the entire work and must have each blank filled" (R. 391).

The same provision is contained in the standard government form of contract relating to the London lock and dam. In the same contract, under general specifications (R. 98), the location is defined as follows: "The site of the work contemplated herein is in the Great Kanawha River near the town of London, West Virginia, about 24 miles above the city of Charleston, West Virginia, and 83 miles above the mouth of the river." On the same page (R. 98), in subsection (b) of Section 2 of general specifications, it is provided: "The work to be done under this contract will consist of furnishing all plant, labor, material and equipment for and constructing and installing the following: * * *" There follows the enumeration of the several items of construction and work to be done (R. 98).

The invitation for bids does not specify the place from which any particular materials or machinery are to be obtained, but does provide that each bidder shall state the organizations by whom the roller gate plans will be prepared and the gates fabricated and erected (R. 390).

The invitation also states that after the bid is opened any bidder may be required by the contracting officer to state whether he is now or ever has been engaged in any contract or other work similar to that proposed, the year in which it was done, and the manner of its execution, and to give such other information as will tend to show his ability to prosecute vigorously the work required by the specifications (R. 388).

The record discloses that prior to entering into the contracts appellee advised the United States that the designs for the roller gate dams would be prepared and furnished by Frederick Krupp Grunsonwerk, Madgeburg, Germany, and that the roller gates would be fabricated and erected by The Dravo Contracting Company, Engineering Works Department, Pittsburgh, Pennsylvania (R. 349-350). Information is also given with the bid as to the type and manufacture of the various items of operating machinery (R. 393-402).

In the performance of the several contracts the roller gates and lock gates were fabricated by the appellee at its Neville Island shop and as well also were the overhead bridges for the dams (R. 350). The appellee bought materials of various kinds from without the state of West Virginia and by its own boats hauled the same into West Virginia, from time to time, as it was needed (R. 350). The appellee also brought some skilled workmen into the state of West Virginia from elsewhere, but employed most laborers locally at the temporary construction offices (R. 380).

The performance of the contracts required, in addition to the installation of the operating machinery and roller gates with respect to the Marmet and London contracts and the lock gates with respect to all four contracts, the doing of vast excavation work and extensive permanent concreting and the like (R. 112, 115, 123).

Partial payments on the roller gates were made as the work progressed in fabricating them at the appellee's Neville Island plant, and when they were delivered at the work site. The final payment, subject to the reservation of a percentage to insure the completion of the work, was made upon final installation (R. 357).

With respect to the Winfield lock gates thirty per cent was paid upon the delivery of the materials at the ap-

pellee's shop in Pennsylvania, thirty per cent upon the fabrication there and the remaining forty per cent upon installation, testing and acceptance at the work sites. With respect to the Gallipolis lock certain partial payments were made upon the delivery of materials at appellee's Pennsylvania plant and additional payments upon the fabrication of certain materials and equipment there, and the balance upon installation, inspection and acceptance.

The Standard Form of Government Contract, Article 16, Clause (c) (R. 68), provides that: "All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as waiver of the right of the Government to require the fulfillment of all of the terms of the contract:"

Appellee contends that the tax is not applicable to the gross income arising from said contracts because: (1) A part of the income was earned by it in the State of Pennsylvania, outside of the jurisdiction of West Virginia, (2) a part of the income accrued from transactions in interstate commerce, (3) the tax cannot be collected from the appellee because it is an instrumentality of the United States, (4) the work within the territorial limits of West Virginia was performed on land under the exclusive jurisdiction of the United States, and (5) that a part of the income not being subject to the tax, and the act not expressly providing for segregation, the whole tax is invalid.

Appellee brought this suit in equity to enjoin the collection of the tax in question, claiming federal jurisdiction because of diversity of citizenship; because the

enforcement of the act would violate the commerce clause of the Constitution of the United States, Article 1, Section 8, paragraph 3; because it was an agent or instrumentality of the United States in the prosecution of the work in question; because enforcement of the statute would constitute legislation by a state with respect to territory over which the United States had exclusive legislative power, in violation of Section 8 of Article I of the Federal Constitution, and because the statute when applied to appellee violated the privilege and immunities clause of the Constitution, Section 1 of the Fourteenth Amendment, and claiming jurisdiction in equity because of absence of an adequate remedy at law. Appellee applied for and insisted upon an interlocutory and a permanent injunction. Appellant filed an answer denying all material allegations of the bill and asserting that appellee was not an agent or instrumentality of the United States and that the tax in question was a valid and proper charge by the state. An extended stipulation of evidence was filed (R. 338).

DISPOSITION OF CASE BY TRIAL COURT

The court below determined that the United States, in the construction of the locks and dams in question, was engaged in a proper and lawful policy of aiding navigation; that the contracts between appellee and the United States for the construction of the locks and dams constituted a sale thereof to the United States; that the tax sought to be imposed was a tax on the contract subsisting between appellee and the United States, and that, inasmuch as it was a tax on the gross receipts of appellee, it constituted a direct burden upon the United States in contracting with appellee rather than a tax upon the income of appellee, and that to impose the tax did not only impede but prevented the carrying out by the United States of projects of the character involved (R. 410-414).

FINDINGS OF FACT

In view of the stipulation the court found it unnecessary to repeat the entire stipulation as findings of fact, but summarized certain material facts appearing from the stipulation considered important in relation to the discussion in the opinion of the court (R. 406-409).

FINAL JUDGMENT

The court awarded a permanent injunction enjoining the enforcement of the statute in question against appellee (R. 415).

STIPULATION OF EVIDENCE

The stipulation of evidence on behalf of appellee shows that the amount involved in this case is the sum of $135,761.51, exclusive of interest and costs, being the amount claimed to be due by appellant to the State of West Virginia from appellee as taxes and penalties under the provisions of the Gross Sales and Income Tax Law of West Virginia, Article 3, Chapter 11, Code of West Virginia, 1931, and as amended effective May 27, 1933, for the years 1933 and 1934 (R. 338).

Appellee is a Pennsylvania corporation, created under the laws of said state, with its principal office and factory in Pittsburgh, Pennsylvania (R. 339).

Appellant has made an assessment against appellee for the calendar years 1933 and 1934 upon the gross receipts of money received by appellee during said two years from the United States of America under four contracts for the construction of locks and dams (R. 339).

Appellant has notified appellee of said assessment and has also notified appellee that unless the said amount claimed to be due to the state as taxes and penalties is

paid immediately appellant would be forced to proceed in accordance with the law to collect the same and to distrain on the property of appellee to collect the same (R. 339).

The amount in figures claimed as taxes and penalties for which appellant has made an assessment against appellee and threatens to distrain upon the property of appellee for the collection of said taxes and penalties is as follows: From January 1, 1933 to May 23, 1933, gross $2,092.78, penalties $774.35; from May 27, 1933 to December 31, 1933, gross $30,011.89, penalties $6,302.50; from January 1, 1934 to December 31, 1934, gross $88,605.51, penalties $7,974.50; total $135,761.51 (R. 340).

During the years 1932 and 1933 appellee entered into four written contracts with the United States pertaining to the construction of locks and dams in the Kanawha and Ohio rivers. These locks and dams were constructed at or near points on said rivers known as Marmet, London and Winfield, West Virginia, on the Kanawha river, and near Gallipolis, Ohio, on the Ohio river, all within the exterior boundaries of the State of West Virginia (R. 340-341). True copies of each of said four contracts were filed with the plaintiff's bill of complaint, as parts thereof. The said four contracts were entered into between appellee and the United States in the following manner: Appellee received by mail in each instance an invitation by the United States to bid upon the proposed work. The invitation was mailed from Huntington, West Virginia, and received by appellee at its office in Pittsburgh, Pennsylvania. Appellee then prepared its regular bid at its office in Pittsburgh, together with the required form, and conveyed same by special messenger to the United States Engineer office of the War Department at Huntington, West Virginia. The United States Engineer office at Huntington notified appellee of the

acceptance of the bids in each instance by letter mailed at Huntington and received by appellee in Pittsburgh. In each instance the contracts were approved and executed by the United States Government (R. 342-343).

The gross income of the appellee for the years 1933 and 1934 for its performance of said four contracts with the United States was as follows (R. 344):

From January 1, 1933 to May 26, 1933,	$ 701,591.99
From May 27, 1933 to December 31, 1933,	1,501,344.67
From January 1, 1934 to December 31, 1934,	4,431,525.63
Total	$6,634,462.29

Payments of the amount received by appellee under the several contracts were made monthly or semimonthly by checks drawn by the disbursing officer of the War Department of the United States at Huntington, West Virginia, on the United States Treasury, in favor of appellee, and were delivered by mail from Huntington to the office of appellee at Pittsburgh. Such monthly or semimonthly payments were based upon estimates of amounts made by the representatives of the United States for materials delivered to and the materials fabricated during the particular month by appellee at its Neville Island shops in Pittsburgh for use in said locks and dams, as provided by the respective contracts, and also for materials delivered, including fabricated materials, for use in the locks and dams to and for work performed during the particular month at each site where the locks and dams were being erected. A retained percentage of ten per cent on each estimate was paid upon the final acceptance of the completed work under each contract (R. 344-345).

During 1933 and 1934 appellee completed the performance of its contracts pertaining to the locks and dams at Marmet and London. Appellee completed performance of its contract at Winfield in February, 1935. Appellee has partially performed its contract at Gallipolis, and is now engaged in the further performance of said contract. For the work so performed during 1933 and 1934 plaintiff received the gross sums hereinabove stated (R. 345).

The tax assessed and sought to be collected by the appellant is based on the provisions of the Gross Sales and Income Tax Law of the State of West Virginia, as hereinbefore stated. A true copy of the said law as amended was filed with appellee's bill of complaint (R. 345).

So far as this suit is concerned, the only difference between the law in effect prior to May 27, 1933 and thereafter is that the rate of tax sought to be imposed prior to May 23, 1933 is three-tenths of one per cent of the gross income of the business, and on and after May 27, 1933, the rate of tax is two per cent of the gross income of the business (R. 345). The above tax is in addition to other taxes imposed on the plaintiff by the State of West Virginia and paid by appellee for the years 1933 and 1934, namely, (1) the tax on foreign corporations for doing business in the state as provided by Article 12 of Chapter 11 of the Code of West Virginia, particularly Sections 69 and 71 thereof, commonly known as the license tax on foreign corporations, and (2) the ad valorem taxes upon the property, real and personal, of the appellee's company in West Virginia. Appellee has also paid each year the annual fees of the state auditor for his services as attorney-in-fact for a foreign corporation as provided by Section 73, Article 12, Chapter 11 of the Code of West Virginia (R. 345-346).

The Gross Sales and Income Tax statutes under which appellant seeks to collect taxes from the appellee are revenue statutes only and not regulatory measures. The revenues realized thereby become part of the general funds of the state and are for the general purposes of state government (R. 346).

Appellee maintained on land owned by the United States at each site of work where the locks and dams were erected in West Virginia a temporary wooden one-story structure for housing maps, plans and records of the work at each site, and also kept its records of the time that the employees of the company worked. Persons applying for employment came in person to the building to make application for work. The building was referred to by those who worked at the respective sites, as "the office," and was or is usually designated as a temporary construction office. There were also temporary structures for storage of tools, implements and materials at the respective sites of work. Those temporary structures were used by the employees of appellee in general for keeping records of the field engineering work, for office work by the field superintendents, by the time keepers to make up their records, the paymaster to make up his payrolls, as a blacksmith shop, and as a first aid station. Appellee received applications for employment at the site of each construction, and employed workmen there. The superintendent who was sent into West Virginia by appellee in connection with the work at Gallipolis for the better part of the year 1934 had a room used as an office on land not owned by the United States at Point Pleasant, West Virginia, for his superintendency and for correspondence, and also kept there a telephone for receipt of orders from appellee at Pittsburgh and to relay such orders to the different sites of work (R. 347-348). Appellee purchased many miscellaneous materials and supplies in West Virginia, the amount expended

therefor amounting to approximately twenty-five thousand dollars a year for each contract (R. 348).

Funds for payroll purposes were forwarded from appellee's depositaries outside of the State of West Virginia to local banks in West Virginia monthly or semi-monthly as required, and workmen were paid by checks drawn on such local banks. Payrolls were kept at the respective sites of construction and sent to appellee in Pittsburgh for its approval and upon its approval and order from appellee at its office in Pittsburgh checks were drawn by a designated employee such as a paymaster or timekeeper at the respective sites of construction and signed by the local superintendent in charge of the work and delivered to the respective workmen. These payments for labor in connection with odd jobs were made by the local superintendent at the sites of construction and paid by him by checks drawn on local banks near each site of construction where small checking accounts were kept for such purposes (R. 348-349).

Appellee prior to entering into the contracts procured by agreement from Frederick Krupp Grunsonwerk, Madgeburg, Germany, the right to procure from such company and to use designs for the roller gates used in the construction of said locks and dams, as well as plans for the fabrication, erection and installation thereof. The roller gates described in the bid and made, fabricated and erected under the contracts were from said designs (R. 349).

In construction of the locks and dams extensive earth and rock excavations on the banks of the rivers and entirely across the beds thereof to such depth as gave solid rock foundation for the concrete and masonary work were made (R. 351).

From time to time partial payments were made by the United States to appellee for certain materials pur-

chased by and delivered to appellee at its Neville Island shops, also for certain articles and equipment manufactured or fabricated by appellee during the progress of the work. Other partial payments were made upon delivery of such manufactured or fabricated articles and equipment at the respective sites of construction and upon installation thereof, as provided in the contracts (R. 357).

In addition to sending men experienced in the construction of locks and dams into West Virginia to have charge of and direct the work, appellee employed certain skilled, semiskilled and unskilled or common labor at each of the sites of construction in West Virginia in carrying out the performance of its several contracts (R. 380).

The United States owns in fee simple, by purchase or condemnation, land within the exterior boundaries of West Virginia at the places where the locks and dams were constructed and on a part of which parts of said locks and dams were erected (R. 381). A deed typical of the other deeds of conveyance to the United States appears from the record (R. 403).

Appellee likewise leased two lots from private owners near Marmet lock and dam, which were occupied and used from time to time during the construction of the lock and dam in connection with the work for storing materials and machinery. Appellee at times used a roadway across one of the lots in connection with the work. Appellee also leased one acre of land from private owners near the Winfield lock during the construction of said lock, on which to store and did store materials to be used in the construction of a dam in event The Dravo Contracting Company, appellee, should be awarded a subsequent contract for building the dam at Winfield (R. 381-382).

The United States constructed said locks and dams for the development and improvement of navigation, the said dams being so designed and constructed as to permit the United States to use, or license the use, of, the water power thereby created for generation of electricity. The United States, by contract dated the 16th day of January, 1934, with the Kanawha Valley Power Company, a private corporation, has granted a license or right to said power company to use the water power resulting from the damming of the river at Marmet and London, under which license the power company constructed, and is maintaining and operating, necessary buildings, generating plants and equipment for the generation and distribution of electricity, by using such water power (R. 382-383).

In 1933 and 1934 plaintiff paid ad valorem property taxes to the State of West Virginia and its political subdivisions, through the sheriffs of various counties thereof, on its personal property in the aggregate amount of $5,792.62 (R. 385).

SPECIFICATIONS OF ERRORS RELIED UPON

Appellant will rely upon the assignment of errors filed with the petition for appeal (R. 420, 421) and upon the points stated to be relied upon set forth in the statement filed under rule 13, paragraph 9 (R. 425, 426) which are as follows:

ASSIGNMENT OF ERRORS

1. The Court erred in holding, as a conclusion of law, that the imposition of the West Virginia Gross Sales and Gross Income Tax (Section 2 (e), Article 13, Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, amending Article 13, Chapter 11, Official Code of West Virginia, 1931) against the

plaintiff with respect to gross income received from the United States for the construction of certain locks and dams, primarily in aid of navigation, on navigable waters within the territorial limits of West Virginia, constitutes a direct burden upon a lawful undertaking of the United States, and that the State of West Virginia has no power to impose upon and collect from the plaintiff such tax.

2. The Court erred in awarding the permanent injunction prayed for in the bill of complaint.

STATEMENT OF POINTS TO BE RELIED UPON

POINT I.

Appellee was an independent contractor with the United States and not an instrumentality thereof and is not exempt from non-discriminatory state taxation.

POINT II.

The several constructions of the locks and dams were purely local undertakings and did not constitute the carrying on of interstate commerce. The acquisition of materials without the State of West Virginia and the transportation of the same into the State of West Virginia, and the fabrication of certain metal parts of the locks and dams without West Virginia, were purely incidental to the local performance of the construction contracts within the State of West Virginia.

POINT III.

The contracts were not performed exclusively upon land purchased or condemned by the United States for the construction of needful buildings and within the exclusive jurisdiction of the United States, but a major part of the construction was upon and within the river

beds as to which no claim was made that the same were acquired by the United States by purchase, condemnation, or otherwise.

POINT IV.

The imposition of the tax here involved against the plaintiff, an independent contractor for gain with the United States, does not constitute a direct burden upon the operations of the United States.

POINT V.

Should the Court be of opinion that the performance of any part of these contracts was without the State of West Virginia or constituted the carrying on of interstate commerce, the tax is clearly of the character to be applicable to the performance of so much of the contracts as constituted the doing of local business within the State of West Virginia.

SUMMARY OF ARGUMENT

I.

The transportation in interstate commerce of materials or parts for the erection of permanent structures affixed to the soil or which are permanently affixed to a building, does not constitute such erection and work that of interstate commerce; the transportation of said materials or parts being purely incidental to the doing of a local act.

General Railway Signal Company v. *Commonwealth*, 246 U. S. 500, 62 L. Ed. 854;

Browning v. *Waycross*, 233 U. S. 16, 58 L. Ed. 828;

Kansas City Structural Steel Company v. *Arkansas*, 269 U. S. 148, 70 L. Ed. 204;

Western Gas Construction Co. v. *Commonwealth,* (Va. 1927) 136 S. E. 646, Affirmed per curiam 276 U. S. 597-8, 72 L. Ed. 723;

In re Springfield Realty Co., (R. C. E. D. Mich. 1919) 257 F. 785;

Mandel Bros. v. *O'Neil, Inc.,* 69 F. (2d) 452;

A. H. Andrews Co. v. *Colonial Theatre Co.,* (D. C. Mich.) 283 F. 471;

Interstate Construction Co. v. *Lakeview Canel Co.,* (Wyo.) 224 P. 850.

II.

One who for gain contracts with the Federal Government does not thereby become an instrumentality of the Federal Government, and his right to do business within the State in which the contract is performed is not immune from taxation by such State.

General Construction Co. v. *Fisher,* (Ore. 1934) 39 P. (2d) 358. Affirmed for want of substantial federal question, 295 U. S. 715, 79 L. Ed. 1671;

Ralph Sollitt & Sons Construction Co. v. *Virginia,* (Va. 1934) 172 S. E. 290, 291. Affirmed for want of substantial federal question, 292 U. S. 599, 78 L. Ed. 1463;

Gromer v. *Standard Dredging Co.,* 224 U. S. 362, 371, 56 L. Ed. 801, 805;

Susquehanna Power Co. v. *Commission,* 283 U. S. 291, 75 L. Ed. 1042;

Baltimore Ship Building & Dry Dock Co. v. *Baltimore,* 195 U. S. 375, 49 L. Ed. 242;

Metcalf v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384;

Kreipke v. *Commissioner,* (C. C. A. 8th 1929) 32 F. (2d) 594;

Silas Mason Co., Inc. v. *Henneford,* (District Court E. D. Washington, N. D.) 15 Federal Supplement 958.

III.

When the activities of a contractor engaged in erecting a structure for the United States Government upon land acquired for needful buildings by the United States Government are not carried on exclusively upon such land so acquired by the United States Government, but are conducted in part upon land subject to the jurisdiction of the State within the territorial limitation of which such contract is performed, the activities of such contractor are subject to the laws of such state.

Ralph Sollitt & Sons Construction Co. v. *Virginia,* (Va. 1934) 172 S. E. 290, 291. Affirmed 292 U. S. 599, 78 L. Ed. 1463;

Ohio River Contract Co. v. *Gordon,* 244 U. S. 68; 61 L. Ed. 997;

Ryan v. *State,* (Washington 1936) 61 P. (2d) 1276.

IV.

Where a state tax is imposed upon the carrying on of a business and it is measured by the amount of business done it is applicable to intrastate business, even though by its terms it may comprehend interstate business as to which it is not applicable.

Singer Sewing Machine Co. v. *Brickell,* 233 U. S. 304, 58 L. Ed. 974;

Bowman v. *Continential Oil Co.,* 256 U. S. 642, 65 L. Ed. 1189.

V.

The imposition of a privilege tax by a State based upon the gross income within said State of an independent contractor for gain with the United States, does not constitute a direct burden upon the operations of the United States.

General Construction Co. v. *Fisher* (Ore. 1934) 39 P. (2d) 358. Affirmed for want of substantial federal question, 295 U. S. 715, 79 L. Ed. 1671;

Silas Mason Co., Inc. v. *State Tax Commission*, (Washington 1936) 61 P. (2d) 1269;

Ryan v. *State*, (Washington 1936) 61 P. (2d) 1276;

Trinityfarm Construction Co. v. *Grosjean*, 291 U. S. 466, 78 L. Ed. 918.

VI.

The appellee has no right to complain of the tax imposed in this case, the Federal Government not complaining nor having commissioned appellee to intervene in its behalf.

General Construction Co. v. *Fisher*, (Ore. 1934) 39 P. (2d) 358. Affirmed for want of substantial federal question, 295 U. S. 715, 79 L. Ed. 1671;

Trinityfarm Construction Co. v. *Grosjean*, 291 U. S. 466, 78 L. Ed. 918;

Meyer Construction Co. v. *Corbett*, 7 Fed. Sup. 616;

Silas Mason Co. v. *Henneford*, 15 Fed. Sup. 958.

ARGUMENT

I.

THE CONTRACTS HERE INVOLVED CLEARLY CONTEMPLATE THE LOCAL CONSTRUCTION OF LOCKS AND DAMS AND SUCH WORK AS MAY HAVE BEEN DONE OUTSIDE OF WEST VIRGINIA IN PREPARATION THEREFOR, AND SUCH INTERSTATE TRANSPORTATION AS MAY HAVE OCCURRED IS PURELY INCIDENTAL TO SAID CONSTRUCTION OF THE LOCKS AND DAMS.

The case of *Casement & Company* v. *Brown*, 148 U. S. 615, 37 L. Ed. 582, while not involving the question of interstate commerce is very elucidating with respect to a contract of the character here involved. This case involved liability for the loss of three barges of coal. The defendants were contractors to build a railroad bridge across the Ohio River opposite the village of Point Pleasant. The defendants contended that they were not independent contractors, but employees of the railroad companies for whom they were building the bridge, and that, therefore, the railroad companies and not the defendants were responsible.

In discussing this contention, Mr. Justice Brewer observed:

> "With reference to the first contention: Obviously, the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies; the size, form, and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size at the places fixed. They selected their own servants and employees. Their contract was to produce a specified result. They were to furnish all the material

and do all the work, and by use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work. The contract was not to do such work as the engineers should direct, but to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the companies' engineers. This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatsoever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with his contract—'only this, and nothing more.' They were to see that the thing produced and the result obtained were such as the contract provided for. * *"

In the case of *Western Gas Construction Company* v. *Commonwealth*, (Va.) 136 S. E. 646, the question was involved of whether the Western Gas Construction Company was doing business in the State of Virginia in the performance of certain contracts for the selling, assembling, installation, and erection of certain gas machines and equipment in the City of Richmond and in the City of

Winchester. It was noted that in each case the contracts involved extensive construction work in the cities. The equipment consisting of several units of a gas generating machine and apparatus known as a water gas generator set, which were shipped from Ft. Wayne, Indiana, the home office of the construction company, to Richmond and Winchester where the assembling was to be completed and the equipment installed, erected, tested and put in operation in accordance with the specifications of the contracts.

It was noted that the equipment was manufactured and assembled, as far as practicable at Ft. Wayne, Indiana, before shipment. It was also noted that great care and skill and experienced workmanship were required and that the work was supervised by experts from the home office.

The court observed in pointing out that the contract was not a transaction in interstate commerce but of a local construction:

> "First of all, there must have been a sale of personal property, which had to be transported in interstate commerce, and, if this was shown, then the seller had the right to set it up, or install it. But in the instant case, looking to the record as a whole, the contract was not for the sale of specific, definite personal property, simply to be transported, and then set up, or installed in place, but a contract to furnish the materials and build an addition to the gas plant of the city of Richmond, according to designated plans and specifications, and to connect it up with the existing plant and other machinery being contemporarily installed. * *"

It should be noted that this decision was affirmed by a memorandum decision of the Supreme Court of the United States. See 276 U. S. 597-8, 72 L. Ed. 723.

In *General Railway Signal Company* v. *Commonwealth*, (Va.) 246 U. S. 500, 62 L. Ed. 854, the question of whether or not the Railway Signal Company in installing certain automatic signals for the Southern Railway Company was engaged in interstate commerce or in local business was involved.

Mr. Justice McReynolds in writing the opinion for the Court recited the following finding of the Corporation Commission of Virginia:

> "'In order to construct these signals as required by the contract it was necessary to employ in this state labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations, and to paint the completed structures. The completed structures are along the side of the railway track, about 2 miles apart, and are 22 or 23 feet high. In the language of the witness, Moffett: "It is necessary to erect the signal mechanism, the masts supporting the mechanism, the houses for protecting the relays, reactors, reactants, and other similar electrical devices protected from the weather, then the transformers, high tension line arresters and low tension line arresters." The completed structures are permanently attached to the freehold upon concrete bases.' "

and concluded:

> "We think the recited facts clearly show local business separate and distinct from interstate commerce within the doctrine announced and applied in Browning v. Waycross, 233 U. S. 16 * *."

In *Kansas City Structural Steel Company* v. *Arkansas*, 269 U. S. 148, 70 L. Ed. 204, the question of whether or not the steel company was doing intrastate business in Arkansas when it contracted to construct a steel bridge in Arkansas and afterwards sublet all of the work except the erection of the steel substructures to a partnership whose members were residents of Kansas was involved. After most of the work sublet had been completed the structural company obtained permission to do business in Arkansas but prior thereto the steel company had shipped steel and various supplies from Kansas City, Missouri, to itself in Arkansas for use in the construction of the bridge and the materials had then been delivered to the subcontractor and used in the performance of work done by it.

It was noted that the steel for the superstructures was fabricated by the steel company in its plant in Kansas City, some before and some after the permission to do business in Arkansas was obtained.

The Court observed:

> "* * * The fact that the materials had moved from Missouri into Arkansas did not make the delivery of them to the subcontractor interstate commerce. So far as concerns the question here involved, the situation is the equivalent of what it would have been if the materials had been shipped into the State and held for sale in a warehouse, and had been furnished to the subcontractor by a dealer. We think it plain that the plaintiff in error did business of a local and intrastate character in Arkansas before it obtained permission. * * *"

Perhaps the leading case is that of *Browning* v. *Waycross*, 233 U. S. 16, 58 L. Ed. 828, involving the selling and installation of lightning rods. It was there held that

the business of erecting lightning rods was within the regulating power of the state and not the subject of interstate commerce, noting that the erection of lightning rods was the doing of a local act after interstate commerce had completely terminated. The Court in that case also pointed out the complications and embarrassments that might result if every incidental act of interstate commerce were regarded as controlling where the performance of a local act was involved.

The idea is well expressed in the case of *Interstate Const. Co.* v. *Lakeview Canal Co.*, (Wyo. 1924) 224 P. 850, at page 852. This case involved a contract made in Denver, Colorado, by the Interstate Construction Company with the Lakeview Canal Company by which the construction company agreed to enlarge a certain canal in Wyoming. Dispute arose under the contract and the Lakeview Company denied the right of the construction company to sue in Wyoming because the construction company did not file acceptance of the Constitution of Wyoming as required for its right to do business in Wyoming prior to the termination of the contract. The contract seemed to have contemplated that horses and some of the machinery used in connection with the canal should be shipped from Denver, Colorado, to Wyoming, and returned after completion of the work. Payment for the use of the horses and machinery was to be made at a definite rate per day. It was contended that the sending of the horses and machinery into the state to do the work constituted interstate commerce. The Court observed:

> "* * * It is clear, however, that such transportation was a mere incident of the work to be performed under the contract. It would have been immaterial whether the outfit with which to do the work was shipped from Denver or from

> some other place. The contract was for the enlargement and extension of a ditch in this state, not for the hire of horses or material. * * *"

It is quite true that the case above referred to as well as the other cases cited under Point I of the Summary of Argument do not involve a tax of the character here involved. However, they do show the difference between a sale of articles to be shipped in interstate commerce and the performance of a local construction contract, even though the machinery and materials with which said contract is performed may have been received in interstate commerce.

Applying these principles to the case at bar, the activities for which the State of West Virginia has claimed the taxes of the appellee are not the shipping of sand or gravel into the State of West Virginia, (R. 356) or the shipping of structural steel from Pennsylvania to West Virginia (R. 356), or the operation of river craft by the appellee in bringing in such materials and other materials (R. 356) or the transporting of same from other States (R. 356) in part to do the work, but the taxes are claimed of the appellee for the privilege of engaging in the occupation of contracting in West Virginia, the bringing into West Virginia of the materials for the performance of these several contracts whether the same be simple materials, or fabricated steel, or what-not, is not the subject matter of the tax. The subject matter of the tax in short is the occupation of contracting in the building of the locks and dams as provided in the contracts therefor.

So far as we have been able to observe, there is not a single provision of the contract (R. 61), or even of the invitation to bid (R. 387), specifying that any particular article shall be obtained at any particular place either within the State of West Virginia or without the State

of West Virginia. The contractor was free to procure the same at any place he saw fit as long as he complied with the provisions, terms and specifications embodied in said contract.

In the case of *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, 79 L. Ed. 838, the Court had under consideration a gallonage tax imposed by the State of Pennsylvania upon all liquid fuels used or sold and delivered by distributors within the State. The distributors under the act were liable for payment of the tax. Plaintiff, a Pennsylvania corporation, engaged in distributing gasoline in that State purchased through its agent in Philadelphia for delivery to purchasers under contract in that city gasoline in Wilmington, Delaware, to be delivered to plaintiff in Pennsylvania in tank cars and placed on its private siding there and sold f. o. b. per order. It was contended by plaintiff that the act was repugnant to the commerce clause of the Constitution.

In holding that the act was valid, the Court observed:

> "• • • Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania.
>
> "• • • These contracts did not require or necessarily involve transportation across the state boundary.
>
> "• • • Deliveries to purchasers at destination were made in accordance with the terms of the sales. As interstate transportation was not required or contemplated it may be deemed as merely incidental."

It is true that the bidders were called upon to furnish information concerning the designers of the roller gates and information concerning the manufacturers of same

(R. 390.). But it is quite clear that the purpose for which this information was desired was not to provide for a purchase by the United States of the required articles and for subsequent transportation into West Virginia, but was only to make provision for suitable investigation and inspection on the part of the United States in order to determine whether or not the appellee or other bidders were in a position to go forward with the contract expeditiously and whether they, or those from whom the required articles were to be obtained, were capable and trustworthy in the matter of performing the contract.

II.

THE APPELLEE IS AN INDEPENDANT CONTRACTOR WITH THE FEDERAL GOVERNMENT, AND NOT AN INSTRUMENTALITY THEREOF, AND, THEREFORE, NOT IMMUNE FROM STATE TAXATION.

The case of *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U. S. 375, 49 L. Ed. 242, and *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371, 56 L. Ed. 801, 805, while involving property taxes, and not excise or privilege taxes, are frequently cited as the leading authorities for the proposition that an independent contractor for gain with the Federal Government is not an instrumentality of the Federal Government, and is not exempt from state taxation as such. So far as we have been able to find, the principles of these cases have not been departed from. We find no full opinion of the Supreme Court of the United States applying the principle of these cases to an excise or privilege tax as applied to such independent contractor, but we do find two very instructive cases, one decided by the Supreme Court of Oregon and the other by

the Supreme Court of Appeals of Virginia, upon each of which cases appeals to the Supreme Court of the United States were dismissed for want of a substantial federal question by memorandum decisions. These cases are as follows:

In *General Construction Co.* v. *Fisher*, (Ore. 1934) 39 P. (2d) 358, an excise tax of the State of Oregon on the privilege of doing business within the State of Oregon was involved in its application to the construction company, an independent contractor with the Federal Government for the construction of a dam and irrigation works in connection with the Owyhee Irrigation project of the Department of Interior of the United States. It was held that the tax was "not unwarranted interference with the function or instrumentality of the Federal Government," notwithstanding the fact that the contractor derived its income within the State of Oregon under contracts with the Federal Government in the construction of dam and irrigation works. The only difference between the *General Construction Company* case and the case at bar is that the Oregon tax was measured by net income rather than by gross income. This feature will be discussed hereafter.

As above noted, an appeal to the Supreme Court of the United States from the decision of the Supreme Court of Oregon was dismissed for want of a substantial federal question. (295 U. S. 715, 79 L. Ed. 1671). It would seem clear that if the question of federal instrumentality or impeding federal function were involved, in conjunction with a tax upon an independent contractor with the Federal Government, the appeal of this case to the Supreme Court of the United States would not have been so dismissed.

In the case of *Ralph Sollitt & Sons Construction Co.* v. *Virginia*, 172 S. E. 290, 291 (Appeal dismissed for want

of substantial federal question, 292 U. S. 599, 78 L. Ed. 1463), there was involved a State contractor's license tax upon the construction company measured by the gross amount of contracts of the construction company. The construction company was engaged in building a post office building in the City of Lynchburg, on land acquired for that purpose by the United States. The Virginia Court observed: "It is in no sense an instrumentality of the government." The case also involved the applicability of the tax where the construction was done on government land. This feature we will discuss hereafter.

Another case involving the converse of this principle, that is, taxation of contractors with the State by the Federal Government, is *Kreipke* v. *Commissioner,* (C. C. A. Eighth Circuit, 1929) 32 F. (2d) 594. In this case, the Kreipke Company entered into certain contracts with the State of Oklahoma for the erection and repair of buildings which were property of the State. The company contended that its income from said contracts were not taxable by the Federal Government. It was held that the company was not an instrumentality of the State Government, and that the tax involved did not constitute a material and substantial interference with the action of a State agency. The Court observed:

> "* * * It would be a far-fetched doctrine to hold that every person, partnership, or corporation entering into a contract with a state government, to do repair work on state buildings or buildings of political subdivisions of the state becomes an instrumentality of the state government and entitled to claim immunity from all federal taxation.
>
> "Appellant and his partnership were independent contractors and in no way instrumentalities or agencies of the state. * * *"

In *Silas Mason Company* v. *Henneford,* (D. C. E. D. Wash. N. D.) 15 Federal Supplement 958, the facts were, in short, that the United States was engaged in the construction of the Grand Coulee Dam for the purpose of controlling floods, improving navigation, etc., and for that purpose a contract was entered into after the receipt of bids, between the United States and the plaintiffs, whereby plaintiffs agreed to furnish materials and perform the work required for the construction of a part of the dam in accordance with certain specifications.

Plaintiffs were non-residents of the State of Washington, had no other business, nor were they engaged in any other operations within that State, save in the construction of the dam, and were there solely for the purpose of discharging their contract obligations with the United States.

The Legislature of the State of Washington enacted a general revenue act providing for a tax on retail sales within the State of Washington, being in effect a tax upon the purchases of materials made by persons within the State of Washington and in other States of the Union.

Plaintiffs, contending that said tax was illegal, maintained that the construction of the dam upon which plaintiffs were engaged under their contract with the United States was a governmental work in the prosecution of which plaintiffs were employed as agencies and instrumentalities of the United States, and, therefore, their property was exempt from the imposition of the tax.

The Court disposed of this argument in the following language:

> "We think that under the record before us this contention is not well founded, when we are confronted with the facts that the plaintiffs are

nothing more than independent contractors performing work and furnishing materials for a definite price which the government has agreed to pay and they have agreed to accept under the contract obtained by competitive bids. Their relations to the government are contractual; they do not exercise governmental functions, as they only undertook to construct the dam according to plans and specifications, adopted by the government, for a profit to be made in so complying. In no way is the government affected by the fact that they pay or do not pay taxes or that they are a government instrumentality. The cases relied upon by plaintiffs are not applicable to the facts here for we find that most of them are based upon facts where the parties claiming exemption were either agents of the government or engaged as employees or officers of the government in the exercise of governmental functions. The authorities seem to agree that independent contractors with the government for gain cannot claim immunity from taxation by reason of furnishing material or labor to the United States." (The Court then cites many cases bearing upon this proposition and then continues.) "Citations of similar import might be multiplied many times, but those cited are enough to demonstrate beyond peradventure that under the record plaintiffs are not so situated as to urge that they are an agency or instrumentality of the United States exercising governmental functions in order to bring them under the rule of exemption of taxes."

We fail to note any material difference whatsoever in the relationship existing between the appellee and the Federal Government in the case at bar, and that existing between the contractors and the Federal Government in the cases discussed above and others cited under Paragraph II, of Summary of Argument.

III.

THE CONTRACTS OF APPELLEE WITH THE UNITED STATES WERE NOT WHOLLY PERFORMED ON LANDS ACQUIRED BY PURCHASE OR CONDEMNATION FOR THE UNITED STATES FOR NEEDFUL BUILDINGS, BUT IN PART UPON LANDS BELONGING TO THE STATE OF WEST VIRGINIA AND SUBJECT TO THE JURISDICTION THEREOF. THE APPELLEE IS NOT EXEMPT FROM WEST VIRGINIA TAXATION.

In the case of *Ralph Sollitt & Sons Construction Co.* v. *Virginia,* (Va. 1934) 172 S. E. 290, as above noted, the contractor was engaged in Lynchburg, Virginia, in the construction of a post office under contract with the United States Government, on lands acquired by the Federal Government for that purpose. It was contended that said land was subject to the exclusive jurisdiction of the Federal Government and that the activities of the contractor were, therefore, exempt from State taxation. It further appeared from the case, however, that under a permit granted the subcontractors of the Ralph Sollitt Company by the city of Lynchburg, practically all of the sidewalk on the three streets adjoining the government property were being used exclusively in the erection of the building. It further appeared that the Sollitt contract with the government could not be performed without using the sidewalks and blocking the streets. It was held, Points 2 and 3 of the syllabus, respectively:

> "Contractor's license tax imposed on foreign contractor engaged in constructing post office under contract with federal government on government property, where contractor used adjoining sidewalks and streets to exclusion of public, *held* not invalid as extending state's jurisdiction to property over which federal govern-

ment has exclusive legislative jurisdiction (Tax Code, Sec. 176; Const. U. S. art. 1, sec. 8, cl. 17)."

"Contractor's license tax imposed on foreign contractor engaged in constructing post office under contract with federal government on government property, where contractor used adjoining sidewalks and streets to exclusion of public, *held* not invalid as depriving contractor of property without due process of law (Tax Code, Sec. 176; Const. U. S. Amend. 14, sec. 1."

In the case of *Ohio River Contract Company* v. *Gordon*, 244 U. S. 68, 61 L. Ed. 997, there was involved the question of whether the courts of the State of Kentucky had jurisdiction of a personal injury action against the Ohio River Company which at the time of the accident was engaged in work under a contract with the United States Government for constructing a canal on a parcel of land acquired by the United States by purchase or condemnation from the State for such purposes. It appeared that in the performance of the contract, in order to dispose of the material excavated, the company had to build a line of railway extending beyond the Federal reservation and connecting with the tracks of a railway company upon whose property within the State of Kentucky all of the rocks excavated were dumped.

It was held that the State Courts did have jurisdiction and that such jurisdiction was not defeated because the injury out of which the cause of action arose happened to be on land over which the Federal Government had exclusive jurisdiction.

In the case of *Ryan* v. *State*, (Washington 1936) 61 P. (2d) 1276, the question of exclusive jurisdiction on the part of the Federal Government over lands acquired by it within the State of Washington for what is known as the Columbia Basin Project, was discussed at length.

It will be noted that one of the taxes sought to be imposed in that case was one based upon the total amount of gross income received by the contractor in the performance of a Federal Government contract upon and within the lands acquired by the Federal Government. The specific contention of the contractor was that by virtue of the United States Constitution and the statutes of the State of Washington that the area contained within the project upon which the excavation and construction work was performed was under the exclusive jurisdiction of the United States, and that, therefore, any tax legislation of the State was wholly inoperative within the area of the project or upon any activities of the appellant therein. The Court said, in part, as follows:

> "The provision of article 1, section 8, cl. 17, * * * has been frequently construed by the United States Supreme Court, and it is now definitely settled and accepted that there are two ways in which lands within the jurisdiction of the State may become subject to the exclusive jurisdiction of the United States: (1) By purchase by the United States for certain specified purposes, with the consent of the State; and (2) cession of exclusive jurisdiction to the United States by the state * * *.
>
> "From these cases the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within article 1, section 8, cl. 17, by purchase with consent of the state, federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but other than by purchase with the consent of the State, then federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is

> acquired for a purpose not within that clause, but by purchase with the consent of the state, then the United States has such jurisdiction over the land as may be ceded to it by the state; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the state, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the state * * *.
>
> "Manifestly, the construction work involved in this case does not come within any of the uses implied in the descriptive terms of the constitutional provision, unless it can be said to come within the term 'other needful buildings.' If the case were one of first impression, the rule of ejusdem generis would, in our opinion, exclude such work from the classification of 'needful buildings' because the particular work was in no way connected with, or related to, forts, magazines, arsenals, or dockyards."

The Court in that case, after citing instances of judicial interpretation as to what the term "needful buildings" means, continues, in part, as follows:

> "While the structures mentioned in the foregoing cases are not specifically named in, and do not strictly fall within, the constitutional classification, it is, nevertheless, apparent that the particular structures or "buildings" in those cases, with the possible exception of one, are such as would necessarily require absolute and exclusive jurisdiction in the United States government, because their operation is in the discharge of a constitutional or governmental function, and there is no field for state participation or state legislation. The only possible exception in the list is the in-

stance of locks and dams, involved in the Tucker Case. But even in such case, if the locks and dams were owned and operated by the United States solely for the purpose of facilitating navigation, as they concededly were in that case, their function would likewise be a constitutional or governmental function. But irrigation, flood control, and power development (except in so far as the latter two are intended to promote navigation or else some war measure or the national defense), while they may be of national interest and serve a public purpose, are not functions enjoined upon the federal government by the Constitution, nor are they delegated to the United States by the Constitution, nor is it necessary that they be committed, for their operation, to the exclusive jurisdiction of the United States government. Legislative power, with reference to such things, is reserved in the state.

"* * *

"The point we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the state, the state's power to cede jurisdiction is limited, by the statute, to those instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose. As stated in the leading case upon the subject, Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525 * * * 29 L. Ed. 264 * * * 'The essence of that provision (article 1, section 8, cl. 17, United States Constitution) is that the state shall *freely* cede the particular place to the United States for one of the specific and enumerated objects.' (Italics ours.)

> "The question in this case, then, is whether by reason of the conjunction of the constitutional provision, the statute, and the acquisition by the federal government of the lands within the project in the manner and for the purposes that the government acquired them, the state has been ipso facto deprived of all jurisdiction with respect to such lands. However close the question may seemingly be, we are of the opinion that the state has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project. The reason for this conclusion is based upon what we conceive to be fundamental principles of law and the conducive facts of this case."

In the case at bar, the United States had acquired by purchase or condemnation fee simple title to said lands on the river banks upon which a part of the locks and dams were erected (R. 381). A typical deed showing the character of the acquisition by the Federal Government is filed with the stipulation as "Appendix E-1", (R. 403) which conveys land to and running with the low water mark of the river.

No contention is made by appellee that the United States purported to acquire fee simple or other title to any part of the bed of the river at the sites of the several contracts.

The stipulation shows that the Kanawha and Ohio Rivers at the points involved are navigable streams (R. 271). The beds of navigable streams are owned by the State of West Virginia. See *James River and Kanawha Power Co.* v. *Old Dominion I. & S. Corporation,* (Va. 1924) 122 S. E. 344; *Commonwealth* v. *City of Newport News,* (Va. 1932) 164 S. E. 689; *Martin* v. *Waddell,* 16

Peters 367, 10 L. Ed. 997; *Pollard* v. *Hagen*, 3 Howard 212, 11 L. Ed. 565; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *U. S.* v. *Arizona*, 295 U. S. 174, 79 L. Ed. 1371; see also *Union Sand and Gravel Co.* v. *Northcott*, 102 W. Va. 519.

In addition to the occupancy and construction upon the bed of the streams, the stipulation shows that appellee leased two lots from private owners near the Marmet lock and dam, which were occupied and used from time to time during the construction of the work there for storing materials and machinery and also used a roadway across one of said lots from time to time during the course of construction (R. 382). The appellee also leased one acre of land from private owners near the Winfield lock and dam during the construction of same on which to store and did store materials to be used in the construction of a dam in the event appellee should be awarded a subsequent contract for building the dam at Winfield (R. 382). The appellee also leased two acres of land from private owners near the Gallipolis lock on which to store material and maintain temporary small buildings (R. 382). Appellee in conjunction with the Gallipolis contract occupied for a time an office in the Town of Point Pleasant (R. 347).

We do not contend that the Federal Government does not have by virtue of its easement, for purposes of navigation on navigable streams (*South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Gibson* v. *U. S.*, 166 U. S. 269, 41 L. Ed. 996), the right to construct in these rivers dams and locks for the purpose of navigation. We do most seriously contend, however, that the beds of navigable streams within the territorial limits of the State of West Virginia do not constitute lands which the Federal Government has acquired by purchase or condemnation for the purpose of constructing needful buildings and the

like within the meaning of Article 1, Section 8, Clause 17, of the Constitution of the United States, which, as contended, gives exclusive jurisdiction over such land to the United States.

Is it not reasonable to assume, in view of the facts, that the State has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project, as pointed out more specifically in the case of *Ryan* v. *State,* (Washington 1936) 61 P. (2d) 1276, heretofore referred to.

Whether or not locks and dams for the purpose of navigation, commercial development of hydroelectric energy and flood control are "needful buildings" within the meaning of Article 1, Section 8, Clause 17, of the Federal Constitution, does not seem to have been the subject of much litigation. The case of *U. S.* v. *Tucker,* 122 Fed. 518, 520, would seem to sustain the view that locks and dams are within the meaning of said clause. On the other hand, a consideration of the principles discussed in the case of *Nikis* v. *Commonwealth,* (Va. 1926) 131 S. E. 236, and the *Ryan* Case just above referred to, would seem to cast considerable doubt upon the conclusion reached in the *Tucker* Case, especially insofar as the jurisdiction of the State within the boundaries of the project is concerned relative to the collection of such a tax as is involved in this case.

We respectfully wish to call the attention of the court to the fact that the Federal Power Commission issued a license to the Kanawha Valley Power Company, (R. 440-445), for the following purposes:

> "Now, Therefore, the Commission hereby issues this license to the Licensee for the purpose of con-

structing, operating and maintaining certain project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from or in said Kanawha River, navigable waters of the United States, and constituting a part of the project hereinafter described; said license, including the period thereof, being subject to all the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto as amended and made effective on the 23rd day of June, 1930, as though fully set forth herein, which said rules and regulations are attached hereto and made a part hereof, and being subject also to the following express conditions and limitations, to wit:''

For this privilege, an annual charge is made in the amount of $32,000.00, relative to the use of the London dam, and in the amount of $32,000.00, relative to the use of the Marmet dam, making a total annual charge of $64,000.00. (R. 444-445). It would therefore seem that this, especially would indicate that the construction here involved was certainly not within the meaning of the term ''useful buildings'', within the meaning of article 1, section 8, clause 17 of the Federal Constitution, especially insofar as state jurisdiction might be concerned.

IV.

EVEN THOUGH A PART OF THE CONTRACT IS NOT LOCAL, THE TAX HEREIN INVOLVED IS CLEARLY OF SUCH CHARACTER AS TO BE SUSCEPTIBLE OF APPLICATION TO THAT PART OF THE RECEIPTS OF APPELLEE FROM BUSINESS DONE WITHIN THE STATE AND EXCLUSIVE OF THAT PART OF THE RECEIPTS DERIVED FROM BUSINESS DONE WITHOUT THE STATE.

Although we are firmly of the belief that the contracts herein involved are for the performance of a purely local act embodying the construction of the several locks and dams, all local in character, and that such work as the appellee may have done in Pennsylvania or elsewhere outside of the State of West Virginia is but incidental to the local performance of the contracts in this State, we desire to point out that said tax is susceptible of division relative to the part of the receipts from business done within the State and the part from business done without the State.

The separability of a tax of the general character of the one involved here, is clearly shown by the decision in the case of *Singer Sewing Machine Company* v. *Brickell*, 233 U. S. 304, 58 L. Ed. 974, in which there was an annual license tax of Fifty Dollars for each county in which sewing machines were sold. The facts show that a part of the business of the Singer Sewing Machine Company was interstate and a part intra-state, and the act was construed as sustaining the requirement of the license in counties where intra-state business was done, though the license could not be enforced with respect to the counties in which the business was interstate.

The Court observed that normally the occupation of selling sewing machines might be and was conducted wholly intra-state and free from any element of interstate commerce, and the fact that, the business was carried on in "one county, a like occupation is conducted with interstate commerce as an essential ingredient, is wholly fortuitous." The Court observed:

> "It would be going altogether too far to say that appellant, being properly taxable, and without the least interference with interstate commerce, in twenty-nine counties of the state, could obtain immunity from all such taxation by estab-

> lishing in one county a system of business that involved transaction in interstate commerce."

And so we contend here that, as has been pointed out in some of the cases above referred to, the business of contracting and constructing is ordinarily essentially local in nature. Certainly, if its activities are otherwise taxable, as we contend they are, the appellee cannot seek immunity from the West Virginia gross sales and income tax merely by introducing one or a few articles in the performance of a large contract, the handling of which articles might possibly be viewed as an act of interstate commerce.

In the case of *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292, 62 L. Ed. 295, it is noted that a tax measured by the gross of business was held invalid as to the gross transactions from foreign commerce but not even questioned as to the gross income from interstate commerce.

Sales to the Government

In the lower Court, appellee insisted that insofar as the fabricated roler gates and other supplies were partially paid for by the United States while the same were in the appellee's Neville Island Plant in Pennsylvania (R. 357-358), and title thereto passed to the United States outside of the State of West Virginia under the provisions of Clause "C" of Article 16, of the standard government form of contract (R. 68-69). The method of partial payments followed in such instances (R. 344 and 357-358), were obviously for the purpose of enabling appellee to perform the contracts with as small an outlay of capital as could reasonably be provided for. The United States, furthermore, was to expend the time of its representatives in inspecting the preparation of the roller gates, and the United States was further interested

in the expeditious completion of the contract (R. 384). It is believed that these partial payments in the provisions of said Clause "C" (R. 68-69), relative to the passing of title, were merely for the purpose of protecting the interests of the United States, and not for the purpose of effecting a sale in the United States of these articles in Pennsylvania when the contracts specifically called for installation in West Virginia (R. 61-62-98). A further purpose was to guard against the contingency of action of other creditors in event the contractor should become financially embarrassed.

It will be noted that this is a provision of the standard form of contract calling for the construction of the dams and locks in West Virginia (R. 61-62 and 98), and that there is nothing in the provisions of this contract which would indicate any intendment that work was to be done anywhere other than in West Virginia. No mention is made in the contract (R. 61) of any sale and no mention is made even in the specifications (R. 428-439) of the exact place at which the fabrication was to be made, although the specifications do provide for the partial payments (R. 429). We believe that the fact that these payments were made when the fabrication happened to be in Pennsylvania is purely incidental to the performance of the contract in West Virginia.

Certainly, there was no requirement under the terms of the contract that work be performed in Pennsylvania. To the contrary, the invitation (R. 387) and the contracts (R. 61) are silent as to the place at which the work was to be done, other than in West Virginia, but the bids, merely for the purpose of information, showed that these fabrications were to be made by the appellee (R. 388). This also is but incidental. The appellee might have had these materials fabricated anywhere and have so specified in its bid. The place was purely incidental.

V.

THE IMPOSITION OF A PRIVILEGE TAX BY A STATE BASED UPON THE GROSS INCOME WITHIN SAID STATE OF AN INDEPENDENT CONTRACTOR FOR GAIN WITH THE UNITED STATES DOES NOT CONSTITUTE A DIRECT BURDEN UPON THE OPERATIONS OF THE UNITED STATES. IT IS IMMATERIAL AS TO WHETHER OR NOT SAID TAX IS BASED UPON GROSS INCOME OR NET INCOME.

In the case of *General Construction Company* v. *Fisher*, (Ore. 1934) 39 P. (2d) 358 (dismissed for want of substantial federal question, 295 U. S. 715, 79 L. Ed. 1671), an excise tax of the State of Oregon on the privilege of doing business within the State was involved in its application to the construction company, an independent contractor with the Federal Government for the construction of a dam and irrigation works in connection with the Owyhee Irrigation Project. It was held that the tax was "not an unwarranted interference with the function or instrumentality of the Federal Government," notwithstanding the fact that the contractor derived its income within the State of Oregon under contracts with the Federal Government in the construction of a dam and irrigation works. The only material difference between the *General Construction Company* case and the case at bar is that the Oregon tax was measured by net income rather than by gross income.

So far as the principle of interference with a function or instrumentality of the Federal Government is concerned, it is not believed that there is any distinction between a tax on net income and a tax on gross income.

The Court in disposing of the question as to whether or not the tax involved was a burden upon the Federal

Government tending to delay and hamper it in the carrying out of its contracts said:

> "When plaintiff, as an independent contractor for gain, entered into a contract to perform labor and furnish materials to the Federal government, it did not thereby become a part of, or an instrumentality of, the United States government, and its property and right to conduct business within the state are not immune from taxation by the state wherein it is located in performing its contract." (Citing various cases.)

The Court further said:

> "On the same principle, the property of plaintiff within the state of Oregon was subject to taxation by the state, even though used in performing a contract with the Federal government. The property thus being taxable, the privilege of using it for such purposes, based on the net income derived from its use, is also taxable, whether called a property tax, a privilege tax, or an income tax. In the final analysis it all amounts to the same thing. It was the property of plaintiff that plaintiff alleges was to be taken for the tax.
>
> "The principle of immunity from state or local taxation of the property and instrumentalities of the United States is generally based upon the direct ownership or use and control of the property by the United States. Such immunity does not extend to the property of an independent contractor for gain, even should it be used in carrying out a contract with the United States. The same principle obtains regarding taxation by the United States of incomes derived by persons and corporations from the state. * * *"

The Court in deciding that the imposition of the tax in that case did not constitute a burden upon the Federal Government, observed further:

> "* * * Every tax levied has some remote tendency to interfere with the contractual relations between parties, but that is no reason why such parties should not contribute their just proportion to the expenses of maintaining the government from which they demand protection for their property and privileges. In the instant case, the work performed by plaintiff was undoubtedly let to the lowest responsible bidder. We cannot see how the tax complained of in any way impaired said contract or hindered the federal government in its governmental functions. * * *" (Citing several cases.)

The Court further observed:

> "It would serve no useful purpose to analyze and distinguish the many cases cited by able counsel for appellant. The basis of the decisions which counsel for appellant claims are in its favor is the fact that the property attempted to be taxed was an actual instrumentality or agency of the federal government. The attempt to evade taxation has been before the appellate courts many times. The artful taxdodger has frequently sought the aid of the courts to be relieved of a just contribution to the maintenance of the government of which the court is a necessary part. But, as above announced, the general principle is that the state cannot levy a tax on an instrumentality of the United States and vice versa. * * *"

In the case of *Trinityfarm Construction Company* v. *Grosjean*, 291 U. S. 466, 78 L. Ed. 918, there was involved a contract between appellant and the United States for

the construction of levees in the Mississippi River. Appellant imported gasoline from other states in carload lots and placed it in a central tank from which distribution was made to the tanks on the right-of-way in proximity to the machines in which used. The State of Mississippi sought to subject appellant to the payment of an excise tax of five cents per gallon on the gasoline imported and used. It was contended that the contracts were federal means or instrumentalities, and if the payment of the excise tax were required it would constitute a burden thereon. The Court held that the tax was proper and not a burden on the Federal Government. The Court observed:

> "* * * Its application does not depend upon the amount of exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motocycle Company* v. *United States*, 283 U. S. 570, 575, 75 L. ed. 1277, 1281, 51 S. Ct. 601, and cases cited. * * *"

See also *Commissioner* v. *Ten Eyck*, 78 Fed. (2d) 515, wherein it was observed: "* * * Where immunity exists it rests upon the entire absence of power to tax."

The case of *Silas Mason Co., Inc.* v. *State Tax Commission*, (Wash. 1936) 61 P. (2d) 1269, which we respectfully submit is almost identical to the case at bar relative to all features thereof, including that of the tax being one upon gross income, involved the power of the State of Washington to exact an occupation tax from the appellants based upon the compensation received by them from the Federal Government for the construction of the Grand Coulee Dam and power plant.

The appellants, by contract, were engaged to construct the dam and power plant in accordance with certain plans and specifications embodied in the contract, which was awarded upon competitive bids. Appellants were non-residents of the State and their sole business therein was the prosecution of the work required by said contract.

Incidental to the performance of the contract, appellants further performed other activities and conformed with the State law relative to the payment of taxes thereon. The challenged occupation tax was one levied upon every person engaged or continuing within the State of Washington in the business of rendering or performing services, professional or otherwise, being an annual tax or excise for the privilege of engaging in such business; the amount of said tax was that equal to the *gross income* of the business multiplied by the rate of five-tenths of one per cent.

In this case, as in the case at bar, the Federal Government, under the terms of the contract, reserved a large measure of supervisory control for the purpose of insuring proper standards of material and workmanship and a compliance with the policy of the government in respect to the conditions of labor, etc.

The Court, in its opinion, quoted with approval from the case of *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 70 L. Ed. 384, in commenting on the contention made that the imposition of a tax tended to hamper and delay the Federal Government in carrying out its contracts, and said:

> " 'Every tax levy has some remote tendency to interfere with the contractual relations between parties, but that is no reason why such parties should not contribute their just proportion to the expenses of maintaining the government from which they demand protection for their property

> and privileges. In the instant case, the work performed by plaintiff was undoubtedly let to the lowest responsible bidder. We cannot see how the tax complained of in any way impaired said contract or hindered the Federal Government in its governmental functions.' "

The Court further observed, deducing the rule from the authorities cited:

> " 'While it is true, generally speaking, that a state may not by its laws hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of government business is not violative of the principles upon which the federal government is founded and performs its duties. The rule of reason must control in all such questions; otherwise the states would be greatly hampered in the conduct of their affairs, without any corresponding benefit flowing to the national government.' "

The Court, in its opinion, commenting upon the cases of *Graves* v. *Texas Company,* 56 S. Ct: 818, 80 L. Ed. 1236, and *Panhandle Oil Co.* v. *Miss.,* 277 U. S. 218, 72 L. Ed. 857, which cases involve the question of a State tax upon the Federal Government, said:

> "In our opinion, there is a vital distinction between the Graves and the Panhandle Oil Company cases and the present case. There, the tax of so many cents per gallon was exacted upon every gallon that left the storage for delivery to the United States. The tax was on the sale to the Government and was direct and immediate. Here, the occupation tax is but one of numerous inci-

dental expenses neeessarily inhering in the qualifications of the contractors to perform the work of the government."

The Court further observed:

"This case, contrasted with Graves v. Texas Co., and the Panhandle Oil Company Case, illustrates, we think, the distinction in principle involved. In the Graves case, the tax was laid upon the direct sale to the government. In the Trinity-farm Construction Co. case, a like tax was paid by the contractor, but the sale was not made directly or in effect to the federal government. It was argued that the tax inhered in the cost of the work performed by the contractor, and, therefore, affected the governmental operations as effectively as if the gasoline had been actually sold to the government. But the court brushed this contention aside by saying that the tax was not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government was a party or in which it was immediately or directly concerned.

"And so, in the present case, the means chosen by the government for building the dam and power plant was by contract, rather than the doing of the work directly by its own officers or agencies.

"* * * Here, the government, by its contract, agreed to pay the contractors a lump sum for the rendition of specified services. When the money is earned and paid to the contractor it becomes a part of his gross earnings, the federal government is no longer concerned with what he may be required to pay as a tax upon the privilege of doing business in this state, no more so than it

was concerned in the amount of the tax paid upon gasoline, by the contractor, in building the Mississippi river levees."

The Court, in commenting on the case of *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. Ed. 787, which involved the Union Pacific Railway, a corporation, chartered by Congress, and performing certain services agreed to be rendered to the Government of the United States, had sought to avoid taxes levied upon its property by one of the counties of the State of Nebraska. Relative to this case the court made the following observation:

"* * * The court, in upholding the tax, pointed out that, as it was levied on the property of the railroad only, it did not affect its capacity to render whatever governmental services it owed the government. In a dissenting opinion, Justice Bradley, after contending that the rule established in *McCulloch* v. *Maryland*, 4 Wheat. 316, 4. L. Ed. 579, and other cases following it, should be applied, makes this significant concession to the prevailing opinion: 'The case differs toto coelo from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution

the powers of the Government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government.'"

The case of *Ryan* v. *State*, (Wash. 1936) 61 P. (2d) 1276, is a companion case to the *Silas Mason Co., Inc.*, case above referred to, and the facts therein are the same except that the question involved was whether or not the State of Washington had jurisdiction within the territory of the project. It would seem that this case sustains the *Silas Mason Co., Inc.*, case as to the legality of a tax based upon gross income.

The opinion of the District Court (R. 410) wherein it is said: "We are of the opinion that the tax here sought to be collected from the plaintiff is a direct burden upon the United States in contracting with the plaintiff rather than a tax upon the income of the contractor," (R. 413) seems to have been based, relative to this, almost exclusively upon a supposed difference between a tax upon gross income and a tax upon net income, citing with approval the case of *United States Glue Company* v. *Town of Oak Creek*, 247 U. S. 321. Realizing full well that there is a difference between the two in principle we, however, respectfully submit that no such difference exists as applied to the facts of the present case.

In the *United States Glue Company* case, the distinction was drawn between the burden of a gross income tax and of a net income tax upon interstate commerce. We can readily see the difference in burden upon articles of interstate commerce where there is a tax upon the gross income of a business and a tax upon the net income of a business within a particular state. Certainly in the case of a tax upon the gross income of a business in a state, which business involves the doing of interstate commerce from which revenues are derived would be a greater and

perhaps more direct burden upon said interstate commerce than would a tax relative to the net income of said business. Gross income in that case would necessarily reach out and involve all of the activities of the business irrespective of whether it was profitable or otherwise, while a tax upon net income would take the form merely of taxing within the State as property of the business that amount which is derived as net income. Net income in such cases becomes, for the purposes of taxation, a definite and tangible thing, a property, and there can hardly be any question but that property which has acquired a situs within a State even though it be an article of interstate commerce can be taxed by that particular State.

American Steel and Wire Co. v. *Speed*, 192 U. S. 500, 48 L. Ed. 538;

Bacon v. *Ill.*, 227 U. S. 502, 57 L. Ed. 615.

Our position, however, is that the construction of these locks and dams is not interstate commerce but is an undertaking purely local and intra-state in character. The contracts were strictly local, as evidenced by the wording contained therein (R. 61). There is nothing in any of the contracts or invitations to bid indicating that interstate transportation of materials or machinery was contemplated. No provision of the contracts or invitations to bid specifies the procuring of same at any particular place. If there was interstate transportation of materials or machinery it was purely incidental to the local construction of the locks and dams. The subject matter of the tax is not the shipping of materials and machinery into West Virginia but engaging in the occupation or business of contracting in West Virginia. The contracts are for the construction of locks and dams in

this state. Transportation, we believe, cannot be correctly compared to contracting for the reason that contracting is essentially local in its character.

Furthermore, the appellee is an independent contractor for gain and not an agent or instrumentality of the Federal Government. The tax here sought to be imposed is not on a contract between plaintiff and the Federal Government but upon the occupation or business of contracting. It is not imposed upon appellee because it is under contract with the Federal Government but because appellee is engaged in the business of contracting in the State. The Act applies to all who engage in a similar business in West Virginia.

The rule recognizing the validity of a net income tax and the invalidity of a gross income tax where the tax involves interstate commerce is not questioned, but it is respectfully submitted that the facts of the instant case do not permit the applicability of such a rule. If the rule of law is such as to prevent a State from taxing the Federal Government, or an agent, or instrumentality thereof, can there be any reason for relaxing this rule when the tax is based upon net income rather than upon gross income? Surely if a burden in one case, it is a burden in the other. If the tax is bad because it is a tax upon gross income as indicated by the opinion by the lower court, then why would it not be bad if it were a tax upon net income. Surely the contractor might pass on to the Government a tax upon the net income, just as easily as that of a tax upon the gross income. However, as heretofore set forth, we firmly believe that the contractor in this case is in no sense an agent or instrumentality of the Federal Government and the tax here is on the contractor, not upon the contract and not upon the United States Government.

VI.

THE APPELLEE HAS NO RIGHT TO COMPLAIN OF THE TAX IMPOSED IN THIS CASE, THE FEDERAL GOVERNMENT NOT COMPLAINING NOR HAVING COMMISSIONED APPELLEE TO INTERVENE IN ITS BEHALF.

In the case of *General Construction Company* v. *Fisher*, (Ore. 1934) 39 P. (2d) 358 (affirmed for want of substantial federal question 295 U. S. 715, 79 L. Ed. 1671), the facts of which are set out in Point V of Summary of Argument, the court made this observation:

> "Plaintiff also contends that the imposition of this tax on it tends to hamper and delay the federal government in carrying out its contracts. The federal government is not complaining. Nor has it commissioned the plaintiff to intervene in its behalf. * * *"

The case of *Meyer Construction Company* v. *Corbett*, 7 Fed. Supp. 616, involved a retail sales tax upon the gross receipts from sales of tangible personal property within the State of California. Plaintiffs were contractors with the United States and engaged in the construction of certain buildings at Hamilton Field in California on property of and under the exclusive jurisdiction of the United States. Plaintiffs' contention was that if they paid the tax it would impede and hamper the United States in carrying out the functions of the government, because the cost of the public works would be increased by the amount of tax. The Court said:

> "May the plaintiffs raise the issue that the Retail Sales Tax Act affects the United States of America? The fact that the plaintiffs have contracts with the United States of America for the construction of certain structures on a govern-

ment reservation does not constitute the plaintiffs an agency or instrumentality of the United States of America. Therefore, the purchase by the plaintiffs of materials, as set forth, cannot be looked upon as a purchase by the United States of America. The plaintiffs are not the proper parties to raise the issue that the United States of America will be hampered or impeded by the collection of a sales tax as here set forth. *Trinityfarm Construction Co.* v. *Alice Lee Grosjean,* 54 S. Ct. 469, 78 L. Ed. 918 (March 5, 1934), and the cases cited therein."

And the Court further said:

"The Retail Sales Tax Act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer. If this tax on retailers for the privilege of doing retail business is unconstitutional, the proper parties to raise the constitutional question are the parties upon whom the tax is levied. If the tax is imposed upon retailers for the privilege of selling tangible personal property at retail, calling for sale and delivery into, or sale in, territory within the exclusive jurisdiction of the federal government, the person whose constitutional right might be affected is the retailer whose privilege of doing a retail business is being taxed."

It is respectfully submitted that the cases of *Silas Mason Company* v. *Henneford,* 15 Fed. Sup. 958, and *Trinityfarm Construction Company* v. *Grosjean,* 291 U. S. 466, 78 L. Ed. 418, and the cases cited therein further sustain the view that the appellee here has no right to complain of the tax on the ground that the same is in any sense a burden upon the Federal Government,

the Federal Government not having complained nor having commissioned appellee to intervene in its behalf.

CONCLUSION

In conclusion it is respectfully submitted: (1) That no part of the building of the locks and dams here involved constitutes interstate commerce; (2) that the appellee is not an instrumentality of the Federal Government but is an independent contractor for profit; (3) that the contracts were not performed on lands exclusively within the jurisdiction of the United States but were performed at least in part on lands subject to the jurisdiction of the State of West Virginia; (4) that the tax sought to be imposed does not constitute a direct burden upon the operations of the United States; (5) that appellee has no right to complain of the tax imposed in this case; (6) that the tax sought to be imposed is not violative of any of the provisions of the Federal Constitution; (7) that the judgment appealed from should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 3

FRED L. FOX, INDIVIDUALLY AND AS STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant,*

vs.

THE DRAVO CONTRACTING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

REPLY BRIEF OF APPELLANT

CLARENCE W. MEADOWS,
Attorney General of West Virginia,
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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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